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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. .....

LOUIS HENRY COX,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Louis Henry Cox, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment denying relief and affirming a judgment of the United States District Court for the Central District of California.

OPINIONS BELOW

No opinion was written by the trial court.

The opinion of the court below is attached hereto as an appendix and made a part hereof. The opinion is as yet not reported.[1]

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed is February 19, 1971, and the time of its entry is the same.

2. A petition for rehearing was filed by petitioner, and the same was denied by the Court of Appeals on March 16, 1971.

A petition for the purpose of withholding the mandate to the District Court was duly filed, and no judgment or mandate has as yet come forth to the District Court.

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question are contained in 28 U.S.C. § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

Petitioner, appellant below, contended that he was denied the effective assistance of counsel for the following reasons: (a) failure to use pretrial discovery, (b) waiving the

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1. The record consists of the Clerk's Transcript in the District Court and in the court below in one volume (C.T.), the Reporter's Transcript in the District Court (R.T.), and the opinion of the court below, which is appended hereto.

jury, (c) stipulating that the package in question contained heroin, (d) failure to object to a telephone conversation, (e) failure to call Herbert Cox as a witness, and (f) conflict of interest on the part of petitioner's attorney which prevented said attorney from properly defending petitioner.

The learned Court of Appeals states in its opinion:

> "We have read the record and, with the exception of the last contention, hold that the actions of the attorney might be viewed as poor trial tactics, but that such actions, even if 'poor' or 'careless', did not rise to the dignity of plain or constitutional error. Certainly there is nothing in the record which would justify us in holding that the performance of appellant's attorney was '. . . so incompetent as to make the trial "a farce or a mockery of justice" . . .', which appellant must show in order to prevail. (Citing cases.)" (Appendix pp. 2 and 3.)
>
> "Appellant's charge that he was denied effective assistance of counsel due to a conflict of interest is based on the fact that his lawyer also represented appellant's brother, Herbert, in another narcotics case at or about the time of appellant's trial. Appellant's contention is without merit. The record indicates that Herbert was in the courtroom during the trial, but was not called to testify for the defense. Although Cox's appellate counsel rather darkly suggests that there may have been a hidden 'deal' between the United States Attorney and appellant's trial attorney not to call Herbert, we find nothing before us which

> even remotely suggests such unprofessional conduct. On this issue, we find ourselves in much the same position as was another panel of this court in *United States v. Mos*, ... F.2d ..... (9th Cir., December 23, 1970), where the same type of charge was made under similar circumstances and was rejected because of the factual inadequacy of the record. From all we can gather from the record in the instant case, the failure to call Herbert might well have been part of the defense strategy of appellant's trial counsel. Moreover, there is nothing which would indicate that appellant even suggested that his brother be summoned. On these facts, we feel compelled to emphasize the basic right and implied authority of counsel to conduct the defense in such manner as he sees fit. (Citing cases.)" (Appendix p. 3.)

With this we cannot agree, for it appears that there was a strong similarity between the defendant-petitioner and his brother Herbert. Surely, Herbert being in court, he should have been called as a witness.

We respectfully direct the Court's attention to *Glasser v. United States*, 315 U.S. 60, 75. In that case, a Mr. Stewart was appointed to represent Mr. Glasser and was also representing another defendant. The court refers to objections by attorney Stewart and says his effort was established as "indicated by Stewart's struggle to serve two masters." Surely, where there was a question of identity, any proof that would reflect upon that issue should have been offered by defense counsel. The brother Herbert sat in the courtroom

and he was not called to testify.

The right to counsel of one's choosing is so basic that we feel it requires no citation to authority; analogous thereto and inseparable therefrom is the right to have the undivided attention of that counsel. As was said in *Glasser v. United States, supra,* 315 U.S. at 75-76:

> "The right to have the assistance of counsel is too fundamental to all courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

We respectfully contend that the representation afforded to this petitioner at the trial level cannot be reduced to a mere question of trial strategy; it is more than that. What could have been more important than showing the possibility that brother Herbert was the man suspected and not this petitioner?

ARGUMENT

We have already referred to the right of petitioner Cox to the undivided attention of counsel, to the end that he receive effective aid of counsel as guaranteed by the Fifth and Sixth Amendments to the United States Constitution. (*Glasser v. United States, supra.*) Additionally, it has been said:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our con-

cept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, *Powell v. Alabama,* 287 U.S. 45, so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

"To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

Lollar v. United States, 376 Fed. 243, 246.

This case does not permit the dilution of this basic right by the excuse that failure to call the brother as a witness was trial strategy. The court should have had this witness before it, to measure his testimony by his demeanor, his candor or lack of it, his interest or bias.

CONCLUSION

We respectfully pray for a hearing before this Court, to the end that justice be done.

Respectfully submitted,

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